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February 1, 2018

Hon. Leonard D. Wexler  
Senior United States District Court Judge  
Eastern District of New York  
944 Federal Plaza  
Central Islip, NY 11722

Re: Berger v. Forager Project, LLC  
Case No. 2:17-cv-06302 (LDW)(SIL)

Dear Judge Wexler:

On behalf of plaintiff, this letter is in response to the January 26, 2017 request of defendant [Dkt. 5] for a pre-motion conference to seek dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

I. Rule 15 Grants Plaintiff the Absolute Right to Amend

In accordance with your Honor's Individual Motion Practice and Rules ("Individual Rules"), Rule 2 (B), this filing is made within seven (7) days from service of the notification letter. The Individual Rules specify that when a party seeks a pre-motion conference, "Service of the letter by the moving party within the time requirements of Rule 12 of the Federal Rules of Civil Procedure shall constitute timely service of a motion made pursuant to Federal Rules of Civil Procedure Rule 12(b)." Rule 2(B).

As such, plaintiff intends to amend the complaint "as a matter of course" pursuant to Fed. R. Civ. P. 15(a)(1)(B) (allowing amendment within "21 days after service of a motion under Rule 12(b)"). *M.E.S., Inc. v. Liberty Mut. Sur. Group.*, No. 10-cv-0798, 2014 WL 46622 (E.D.N.Y. Jan. 6, 2014), \*2 (finding that Rule 15(a)(1)(B) permits plaintiff's filing of an amended complaint, "as of right" in response to defendant's request for a pre-motion conference) quoting *Matana v. Merkin*, No. 13-cv-1534, 2013 WL 6147700, at \*2 n.1 (S.D.N.Y. Nov. 22, 2013).

Though defendant's letter alludes to a waiver made by plaintiff as to its right to amend, Fed. R. Civ. P. 15(a) "gives plaintiffs an unequivocal right to file one amended complaint without leave of court before defendant's filing of a responsive pleading." *Gaming Marketing Solutions, Inc. v. Cross*, 528 F.Supp.2d 403, 406 (S.D.N.Y. 2007).

Plaintiff is not required to seek defendant's consent or leave of Court for filing an amended complaint within the time limits provided by Rule 15. *Canales v. Sheahan*, No. 12-cv-693A (W.D.N.Y. Feb. 9, 2016) ("Rule 15 confers 'an absolute right to amend' when a plaintiff submits a timely amendment and no responsive pleading has been served."); *Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 243 (2d Cir. 2007) ("At the time that plaintiffs moved to amend their complaint, defendants had not filed an answer. Defendants' motion to dismiss, because it was a motion, not a pleading, was not a 'responsive pleading' within the meaning of Rule 15(a).")

(citation omitted); *Winfield v. Babylon Beauty School of Smithtown*, 89 F. Supp. 3d 556, 561 (E.D.N.Y. 2015) (“Pursuant to Rule 15(a)(1)(B), a party may amend a complaint without leave of the Court within 21 days after service of a motion under Rule 12(b). The Plaintiffs filed an amended complaint on April 28, 2014, within 21 days of being served with the Defendants’ first Rule 12(b)(6) motion to dismiss.”).

II. Plaintiff Shall Amend the Complaint No Later than February 19, 2018

Plaintiff shall file its amended complaint on or before Monday, February 19, 2018. This date is twenty-one (21) days after the date on which defendant filed their pre-motion letter, excluding the day of the event that triggered the period, January 26, 2018. Fed. R. Civ. P. 6(a)(1)(A). Because the calculation of twenty-one (21) days conclude on Saturday, February 17, 2018, the time to amend runs until Monday, February 19, 2018. Local Civil Rule 6.4 (“Computation of Time”) (incorporating the provisions of Fed. R. Civ. P. 6 and stating that “[I]f the last day of the period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.”).

III. Conclusion

Plaintiff respectfully requests that in light of its intention to amend as of right under Fed. R. Civ. P. 15(a)(1)(B), the Court stay the pre-motion conference requested by defendant. Thank you.

Respectfully submitted,

/s/ Joshua Levin-Epstein  
Joshua Levin-Epstein

cc: Defendant’s Counsel (via ECF)